

**PLAINTIFFS'  
OPPOSITION TO  
GOOGLE'S MOTION IN  
LIMINE NUMBER 1 TO  
EXCLUDE EVIDENCE  
AND ARGUMENT RE:  
SANCTIONS  
PROCEEDINGS AND  
DISCOVERY  
MISCONDUCT**

**Redacted Version of Document  
Sought to be Sealed**

**BOIES SCHILLER FLEXNER LLP**

David Boies (admitted pro hac vice)  
 333 Main Street  
 Armonk, NY 10504  
 Tel: (914) 749-8200  
 dboies@bsfllp.com

Mark C. Mao, CA Bar No. 236165  
 Beko Reblitz-Richardson, CA Bar No. 238027  
 44 Montgomery St., 41st Floor  
 San Francisco, CA 94104  
 Tel.: (415) 293-6800  
 mmao@bsfllp.com  
 brichardson@bsfllp.com

James Lee (admitted pro hac vice)  
 Rossana Baeza (admitted pro hac vice)  
 100 SE 2nd St., 28th Floor  
 Miami, FL 33131  
 Tel.: (305) 539-8400  
 jlee@bsfllp.com  
 rbaeza@bsfllp.com

Alison L. Anderson, CA Bar No. 275334  
 M. Logan Wright, CA Bar No. 349004  
 725 S. Figueroa St., 31st Floor  
 Los Angeles, CA 90017  
 Tel.: (213) 629-9040  
 alanderson@bsfllp.com

*Attorneys for Plaintiffs*

**SUSMAN GODFREY L.L.P.**

Bill Carmody (admitted pro hac vice)  
 Shawn J. Rabin (admitted pro hac vice)  
 Steven M. Shepard (admitted pro hac vice)  
 Alexander Frawley (admitted pro hac vice)  
 1301 Avenue of the Americas, 32nd Floor  
 New York, NY 10019  
 Tel.: (212) 336-8330  
 bcarmody@susmangodfrey.com  
 srabin@susmangodfrey.com  
 sshepard@susmangodfrey.com  
 afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891  
 1900 Avenue of the Stars, Suite 1400  
 Los Angeles, CA 90067  
 Tel.: (310) 789-3100  
 abonnn@susmangodfrey.com

**MORGAN & MORGAN**

John A. Yanchunis (admitted pro hac vice)  
 Ryan J. McGee (admitted pro hac vice)  
 201 N. Franklin Street, 7th Floor  
 Tampa, FL 33602  
 Tel.: (813) 223-5505  
 jyanchunis@forthepeople.com  
 rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805  
 711 Van Ness Ave, Suite 500  
 San Francisco, CA 94102  
 Tel: (415) 358-6913  
 mram@forthepeople.com

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,  
 JEREMY DAVIS, CHRISTOPHER CASTILLO,  
 and MONIQUE TRUJILLO individually and on  
 behalf of all other similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' OPPOSITION TO  
 GOOGLE'S MOTION *IN LIMINE*  
 NUMBER 1 TO EXCLUDE EVIDENCE  
 AND ARGUMENT RE: SANCTIONS  
 PROCEEDINGS AND DISCOVERY  
 MISCONDUCT**

Judge: Hon. Yvonne Gonzalez Rogers  
 Date: November 29, 2023  
 Time: 9:00 a.m.

## I. INTRODUCTION

Google’s Motion *in Limine* Number 1 is overbroad and premature. It seeks to “exclude any evidence and argument regarding the sanctions orders, sanctions proceedings, or alleged discovery misconduct”—claiming these matters are “irrelevant” to the issues being tried. Mot. at 1, 4. But trial hasn’t started yet. Relevance will depend in part on how Google tries the case. For example, if Google seeks to repeatedly criticize Plaintiffs for lacking evidence of “X,” then it may be appropriate to allow the jury to “infer from Google’s failure to disclose these data sources that they are not helpful to Google.” Dkt. 898 at 8. Magistrate Judge van Keulen correctly reasoned that it was “premature” for her to decide whether Google’s misconduct is relevant to the jury trial. That is for this Court to decide. And that decision should be made during trial—not three months in advance.

There is a better way. This Court can reserve judgment until trial begins. That is the approach other courts have taken when confronted with similar motions *in limine*, focused on sanctions-related evidence. *E.g.*, *Darmer v. State Farm Fire and Casualty Co.*, 2022 WL 741039, at \*2 (D. Minn. Mar. 11, 2022) (“allow[ing] references [to sanctions] to be made in closing statements, if Darmer’s misconduct comes up at trial”); *Entrata, Inc. v. Yardi Sys., Inc.*, 2019 WL 4165121, at \*\*4–5 (D. Utah. Sept. 3, 2019) (deferring any ruling on motion *in limine* to “preclude any evidence or references to pretrial discovery conduct, disputes, or sanctions,” explaining that “[t]he court will rule on the admissibility of specific items of evidence at the time they are offered at trial”). Two weeks is a long time, and a lot can happen during trial. There is no need to prejudge.

## II. BACKGROUND

In May 2022—after the close of discovery—Magistrate Judge van Keulen sanctioned Google for not disclosing █████ private browsing detection bits, in violation of three discovery orders. Dkt. 588-1. Within its logs, Google uses these detection bits to apply a █████ value to the data, thus indicating whether that data is private browsing data. *Id.* at 5. According to Magistrate Judge van Keulen, *these bits “were very clearly relevant”* (*id.* at 28) and Google “was grossly negligent in failing to turn over” this evidence. *Id.* at 43. Among other sanctions (including witness preclusion) she recommended an adverse-inference jury instruction, while clarifying that it was “premature to determine if the misconduct is relevant to issues for the jury.” *Id.* at 44. She also required Google to

1 “provide Plaintiffs with a representation in writing . . . that other than the logs identified thus far as  
2 containing Incognito detection bits, ***no other such logs exist.***” Dkt. 588 at 6.

3 Then Google revealed more. After a brief investigation, Google disclosed [REDACTED] more logs that  
4 use private browsing detection bits. Dkt. 614-2 ¶ 4 & at 6–8. These logs revealed previously unknown  
5 uses of private browsing data, but one log was particularly noteworthy. Aptly named a [REDACTED] log,  
6 this log proved that Google stores private browsing data and signed-in data in the very same log. Dkt.  
7 898 at 13–14. That revelation contradicts prior representations from Google’s counsel and experts.<sup>1</sup>

8 We don’t know how many more logs are like these ones because Google stopped looking for  
9 them. The employee in charge of its post-sanctions investigation explained in a sworn declaration  
10 that while he initially planned to search for all logs with private browsing detection bits, he later  
11 decided to conduct a far more limited investigation, focused only on the [REDACTED] then-identified bits.  
12 *See* Sramek Aug. 18 Decl. (Dkt. 695-4) ¶ 7 (“***I understood*** the Court’s order required me to attest  
13 that there are no other data sources at Google in which ***any field is used by any team to infer***  
14 ***Incognito browser state*** in any form. To provide such a declaration, ***multiple months-long***  
15 ***investigations would have been required.*** However, ***I understand now*** that the Court seeks  
16 affirmation only for the data sources with the following [REDACTED] fields . . .”). In any event, focusing the  
17 investigation on those [REDACTED] bits might make sense if those [REDACTED] bits are the only private browsing  
18 detection bits.

19 They are not. On December 20, 2022—nine months after the close of discovery—Google  
20 disclosed yet another private browsing detection bit: the [REDACTED] field. *See* Dkt. 898  
21 (March 2023 Sanctions Order) at 3; *see also* Dkts. 810, 816 (parties’ briefs addressing this bit).  
22 Importantly, Google did not uncover this bit through its post-sanctions investigation; rather, Google’s  
23 counsel allegedly stumbled upon it through work for the *Calhoun* case. And this bit is unique. Unlike  
24 the original [REDACTED], this one is relevant to both Class 1 and Class 2 because Google used it to detect  
25

26  
27 <sup>1</sup> *See* Psounis Rep. ¶¶ 45, 47 (Dkt. 659-10) (“Google . . . maintain[s] and enforce[s] separation  
28 between . . . authenticated logs and . . . unauthenticated logs.”); *see also* 4/29/2021 Tr. 16:16–20:2  
 (“[t]he most important issue here . . . is that logs are internally segregated by whether you’re logged  
 into a Google account or aren’t.”).

1 private browsing for Chrome Incognito as well as non-Chrome private browsers. Dkt. 898 (March  
2 2023 Sanctions Order) at 16. We still don't know if there are other bits and corresponding logs.

3 Plaintiffs moved for additional sanctions (Dkts. 615, 656), focusing on the [REDACTED] new logs and  
4 also this new bit. That motion was granted in part, with Magistrate Judge van Keulen excluding  
5 additional witnesses and amending her jury instruction recommendation "to provide additional  
6 context and information about the scope of Google's discovery misconduct." Dkt. 898 at 11.

7 After the sanctions process concluded, Plaintiffs served a supplemental expert report from  
8 their technical expert, Jonathan Hochman. This report did not contain any new opinions. Instead, "the  
9 purpose of this report is to explain how the new information Google provided [the [REDACTED] logs and the  
10 [REDACTED] bit] further substantiates several opinions I already offered." Dkt. 990-1  
11 (Hochman Jun 2023 Rep. ¶ 3). This information was not available to Mr. Hochman when he prepared  
12 his reports during the expert discovery period.

### 13 **III. ARGUMENT**

14 It would be premature for this Court to wholesale exclude any mention of sanctions-related  
15 issues. Evidence relating to Google's discovery misconduct, including the jury instruction, may  
16 become relevant, including based on Google's approach to trial. Case in point is Google's initial  
17 deposition of Mr. Hochman. That deposition occurred before Google disclosed the  
18 [REDACTED] bit, which is relevant to Class 2 (as explained above). Google's lawyer criticized  
19 as "speculation" Mr. Hochman's opinion that Google can identify Class 2 members, grilling him for  
20 failing to identify any detection bit relevant to Class 2. Hochman Tr. (Ex. 1) 408:21–24. Yet as it  
21 turns out, there was such a bit; it just hadn't been disclosed yet.

22 Google employed the same tactic during its most recent deposition of Mr. Hochman. This  
23 time focused on [REDACTED], counsel asked if Mr. Hochman has any evidence that Google  
24 used this bit "to isolate private browsing data." Mr. Hochman responded: "That's an unknown."  
25 Hochman October 2023 Rough Tr. 76:5–7 (Ex. 2). But Plaintiffs received virtually no discovery into  
26 this bit, save for a short employee declaration that Google submitted with a motion to "deprecate" the  
27 bit—filed almost a year after the close of discovery. *See* Dkt. 810. If Google will pursue the same  
28 strategy at trial, repeatedly criticizing Plaintiffs for supposedly failing to identify evidence of "X,"

1 then the jury instruction may become warranted. It would be appropriate to allow the jury to “infer  
2 from Google’s failure to disclose these data sources that they are not helpful to Google.” Dkt. 898 at  
3 18.

4 Mr. Hochman’s opinions about Google’s post-sanctions investigatory work are also relevant.  
5 In a small portion of his report, he evaluates statements from Google engineers who worked on  
6 Google’s investigation, and he provides technical insight into how Google could have done a more  
7 thorough investigation for additional bits and logs. Hochman June 2023 Rep. ¶ 39. This testimony  
8 can “help[] the jury decide whether to draw an adverse inference—as it was instructed it could do.”  
9 *GN Netcom, Inc. v. Plantronics*, 930 F.3d 76, 86 (3d Cir. 2019) (reversing judgment and ordering a  
10 new trial where the district court excluded expert testimony about spoliation, reasoning that testimony  
11 was “undoubtedly relevant”). Mr. Hochman’s opinions are likewise “probative of whether evidence  
12 contained [in the logs] would have been unfavorable” to Google. *Zucchella v. Olympusat, Inc.*, 2023  
13 WL 2628107, at \*8 (C.D. Cal. Jan. 10, 2023). Google’s cases are far afield.<sup>2</sup>

14 Moreover, if sanctions become relevant at trial, there will be no “unfair prejudice” to Google.  
15 Fed. R. Evid. 403. The key word is “unfair.” Google admits the sanctions were issued to “cure”  
16 *Plaintiffs’* prejudice. Mot. at 1. If parties could evade the impact of adverse-jury instructions by  
17 claiming unfair prejudice, there would be no reason to comply with discovery obligations. Sanctions  
18 would be toothless. *See Plantronics*, 930 F.3d at 88 (“though the [spoliation] testimony could have  
19 had some prejudicial effect, that prejudice would not have been unfair”). Finally, Plaintiffs are not  
20 seeking to “relitigate” the sanctions. Mot. at 1. If anything, Google is the party seeking to relitigate  
21 sanctions, only this time by erasing them before this Court can assess their relevance.

---

22  
23  
24 <sup>2</sup> In *Pavemetrics*, the Court granted a new trial because while plaintiffs’ “statements left the jury with  
25 the impression that [defendant] had something to hide ... no evidence suggests [defendant] acted  
26 improperly.” *Pavemetrics Sys., Inc. v. Tetra Tech.*, 2023 WL 1836331, at \*4 (C.D. Cal. Jan. 23, 2023).  
27 Similarly, in *Alameda*, the discovery misconduct at issue was only purported, not confirmed by the  
28 court. *M.H. v. Cnty. Of Alameda*, 2015 WL 894758, at \*11 (N.D. Cal. Jan. 2, 2015). Here, Judge Van  
Keulen already found that Google acted improperly. And while the court in *Edwards* precluded  
plaintiff from raising discovery disputes at trial, the sanctions there did not involve a finding or jury  
instructions that the misconduct caused prejudice. *See Edwards Lifesciences Corp. v. Meril Life  
Sciences Pvt. Ltd.*, 19-cv-06593, Dkt. 369 (N.D. Cal. Jan. 14, 2022).

1 **IV. CONCLUSION**

2 Plaintiffs respectfully ask that the Court deny Google's *Motion In Limine* No. 1.

3  
4  
5 Dated: October 17, 2023

Respectfully submitted,

6 By: /s/ Mark Mao

7 Mark C. Mao (CA Bar No. 236165)  
8 mmao@bsflp.com  
9 Beko Reblitz-Richardson (CA Bar No. 238027)  
brichardson@bsflp.com  
10 BOIES SCHILLER FLEXNER LLP  
44 Montgomery Street, 41st Floor  
11 San Francisco, CA 94104  
Telephone: (415) 293-6800  
12 Facsimile (415) 293-6899

13 David Boies (admitted pro hac vice)  
dboies@bsflp.com  
14 BOIES SCHILLER FLEXNER LLP  
333 Main Street  
15 Armonk, NY 10504  
Telephone: (914) 749-8200  
16 Facsimile: (914) 749-8300

17 James Lee (admitted pro hac vice)  
jlee@bsflp.com  
18 Rossana Baeza (admitted pro hac vice)  
rbaeza@bsflp.com  
19 BOIES SCHILLER FLEXNER LLP  
100 SE 2nd Street, Suite 2800  
20 Miami, FL 33131  
Telephone: (305) 539-8400  
21 Facsimile: (305) 539-1307

22 Alison L. Anderson (CA Bar No. 275334)  
alanderson@bsflp.com  
23 M. Logan Wright (CA Bar No. 349004)  
mwright@bsflp.com  
24 BOIES SCHILLER FLEXNER LLP  
725 S. Figueroa St., 31st Floor  
25 Los Angeles, CA 90017  
Telephone: (213) 629-9040  
26 Facsimile: (213) 629-9022  
27  
28

1 Bill Carmody (pro hac vice)  
2 bcarmody@susmangodfrey.com  
3 Shawn J. Rabin (pro hac vice)  
4 srabin@susmangodfrey.com  
5 Steven Shepard (pro hac vice)  
6 ssh Shepard@susmangodfrey.com  
7 Alexander P. Frawley (pro hac vice)  
8 afrawley@susmangodfrey.com  
9 SUSMAN GODFREY L.L.P.  
10 1301 Avenue of the Americas, 32nd Floor  
11 New York, NY 10019  
12 Telephone: (212) 336-8330  
13 Facsimile: (212) 336-8340

14 Amanda Bonn (CA Bar No. 270891)  
15 abonn@susmangodfrey.com  
16 SUSMAN GODFREY L.L.P.  
17 1900 Avenue of the Stars, Suite 1400  
18 Los Angeles, CA 90067  
19 Telephone: (310) 789-3100  
20 Facsimile: (310) 789-3150

21 John A. Yanchunis (pro hac vice)  
22 jyanchunis@forthepeople.com  
23 Ryan J. McGee (pro hac vice)  
24 rmcgee@forthepeople.com  
25 MORGAN & MORGAN, P.A.  
26 201 N Franklin Street, 7th Floor  
27 Tampa, FL 33602  
28 Telephone: (813) 223-5505  
Facsimile: (813) 222-4736

Michael F. Ram (CA Bar No. 238027)  
mram@forthepeople.com  
MORGAN & MORGAN, P.A.  
711 Van Ness Avenue, Suite 500  
San Francisco, CA 94102  
Telephone: (415) 358-6913  
Facsimile: (415) 358-6923

*Attorneys for Plaintiffs*



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28